A

T SIVAM THARAMALINGAM v. PUBLIC BANK BHD

FEDERAL COURT, PUTRAJAYA
ZULKEFLI AHMAD MAKINUDIN PCA
ZAINUN ALI FCJ
RAMLY ALI FCJ
B
AZAHAR MOHAMED FCJ
BALIA YUSOF WAHI FCJ
[CIVIL APPEAL NO: 02(f)-76-07-2017(J)]
17 MAY 2018

C

LAND LAW: *Charge – Validity – Chargor obtained title to land by fraud – Allegation of – Whether bank's registered charge over land defeasible – Whether bank obtained deferred indefeasibility of title – Bank denied knowledge of fraudulent or improper acquisition of land – Whether bank subsequent owner of interest in good faith for valuable consideration – Whether bank availed protection under*
D *s. 340(3) of National Land Code – Common solicitor – Whether knowledge of solicitor imputed to bank – Whether defeated defeasibility of title*

The deceased, Nagamuthu a/l Periasamy, was the original registered proprietor of the land. On or about 16 May 2006, the son of the deceased, Nagarajan, fraudulently transferred the land to himself. One Mr P
E Thirumalai acted as a common solicitor for the deceased and Nagarajan ('the solicitor'). Subsequently, pursuant to a letter of offer dated 18 October 2006 and a facility agreement dated 22 February 2007, the respondent, Public Bank Bhd ('the defendant') granted a fixed loan of RM100,000 to Nagarajan and one Sithra Velusamy. In this transaction, the solicitor, who
F acted for Nagarajan, had also acted for the defendant. A charge, in favour of the defendant, was created over the land. When the deceased came to know of the fraudulent transfer, the deceased brought a claim against Nagarajan to recover the land, alleging that the transfer of the land was by fraudulent means ('2007 suit'). After a full trial, the Muar High Court allowed the claim
G by the deceased and declared that the transfer of the land to Nagarajan was invalid as it was acquired through fraudulent means and the transfer was accordingly set aside. The decision was affirmed by the Court of Appeal. Nagarajan's notice of motion to the Federal Court for leave to appeal was also dismissed. The present appeal originated from an action commenced by
H the appellant ('the plaintiff'), as the administrator of the estate of the deceased, pertaining to the charge over the land in favour of the defendant ('2013 suit'). The plaintiff's claim was essentially that the defendant's title, as the registered chargee over the land, was defeasible and not valid as Nagarajan allegedly acquired the land fraudulently and, thus, the charge was defeasible by the element of fraud and liable to be set aside. In its defence,
I the defendant relied upon s. 340(3) of the National Land Code ('NLC') to avail itself of a deferred indefeasibility of title contending that it had no

knowledge of the fraudulent or improper acquisition of the land by Nagarajan from the deceased. The important part of the defence was that the charge was indefeasible as the defendant acquired a subsequent interest in the land as a registered chargee in good faith and for valuable consideration. The High Court allowed the plaintiff's claim and held, *inter alia*, that (i) the charge was defeasible as the land was fraudulently transferred despite the defendant not having any knowledge of the fraud; (ii) the charge was invalid in law as it was based on a void instrument of transfer considering that the transfer of the land from the deceased to Nagarajan was effected by fraudulent means; and (iii) the principle of *nemo dat quod non habet* would defeat the defendant's position as a *bona fide* subsequent purchaser in land since Nagarajan did not have good title. However, the Court of Appeal reversed the decision, holding that the High Court failed to appreciate that the defendant was a subsequent purchaser in good faith and for valuable consideration and therefore, enjoyed the protection under the proviso to s. 340(3) of the NLC. Hence, the plaintiff's appeal on the questions of law: (i) whether knowledge on the part of the solicitor of claims which amounted to encumbrances over a piece of land was imputed back to his client for the purposes of s. 340(3) of the NLC; and (ii) whether the principle of constructive notice does not apply to the Torrens system, in that, an agent's ('solicitor') knowledge of fraud could not be imputed to his client, is correct in law (*Doshi v. Teoh Tong Lay*).

Held (allowing appeal with costs)
Per Azahar Mohamed FCJ delivering the judgment of the court:

(1) The term 'purchaser' in the proviso to s. 340(3) is not limited to those who acquire the land but extends to those acquiring an interest in the land, such as a chargee bank. The term 'interest' includes a charge that is a registered interest affecting land. Section 5 of the NLC defined 'purchaser' as a person or body who in good faith and for valuable consideration acquires title to, or any interest, in the land. Section 241(1) of NLC allows a charge to be created over any alienated land to secure the repayment of any debt. Every charge created under the NLC shall take effect upon registration. Therefore, the defendant fell within the definition of 'purchaser' in the proviso to s. 340(3), and was therefore, a subsequent purchaser under the proviso. (paras 29 & 30)

(2) A subsequent purchaser in good faith and for valuable consideration enjoys immunity from adverse claim to his title. Therefore, between the competing claims of the original owner and the subsequent purchaser in good faith and for valuable consideration, the latter would be entitled to ownership of the subject land. Indefeasibility is conferred on the current registered proprietor, and not a former registered proprietor. This is a statutory protection accorded to a subsequent acquirer of interest. (para 38)

(3) The law recognises and enforces an overriding rule that in making and carrying out a conveyancing transaction that commonly deals with a number of transactions and dealings to transfer real property, parties should act in good faith. The element of good faith depends upon the circumstances of the case. It is not enough for a purchaser to merely show absence of fraud, deceit or dishonesty; knowledge of a dispute as to the ownership of property and knowledge of fraud allegation, for example, could vitiate good faith. (para 50)

(4) It was clear from the letter to the solicitor dated 25 July 2006 by Messrs Ramesh, Vassn & Co, acting for the deceased, that the solicitor had explicit knowledge of the existence of an adverse or rival claim on the land, and more importantly, of the allegation that 'the transfer of the said property from Nagamuthu a/l Periasamy to your client was conducted fraudulently'. Hence, the solicitor was actively involved in the dispute as to the ownership of the land between the deceased and Nagarajan. (paras 54 & 55)

(5) The general law of principal and agent is applied to the actual facts herein to answer the question as to whether the knowledge of the solicitor should be imputed to the chargee bank. Imputed knowledge, where it operates, deems the principal to have the actual knowledge, which the agent has. It is irrefutable that the relationship between the defendant and the solicitor was that of a principal and agent. It is well settled law that the knowledge of a solicitor is regarded by law as the knowledge of the client, so that it is not open to the client to say that the solicitor did not disclose the true facts to him. (paras 59-61)

(6) An exception to the principle that the knowledge of a solicitor is the knowledge of the client is only admitted where the agent (or solicitor) is complicit in the said fraud. Where the solicitor was not complicit in the fraud but had knowledge of the same, that knowledge must be imputed to the defendant. Hence, the knowledge of the solicitor herein was the knowledge of the defendant and the defendant was bound by it. The defendant granted the loan and proceeded to register the charge, knowing through the solicitor that there was a serious dispute as to the ownership of the land and that there was serious allegation that Nagarajan obtained title to the land by fraud. The defendant could not say that it was not aware of the dispute and the fraud allegation. (paras 67, 69 & 73)

(7) The knowledge of facts of the solicitor acquired in the earlier transaction must be imputed to the defendant in the course of acting for the defendant in the conveyancing transaction, although the defendant was not interested in the earlier transaction. The solicitor's knowledge of facts was acquired in a transaction on the same piece of land and the two transactions were immediately consequent on one another and were very

closely connected that the first must obviously have been still present in the solicitor's mind. The defendant was therefore infected with the knowledge that there was a serious dispute as to the ownership of the land. This type of knowledge would affect the good faith of the defendant and hence, the status of holder of interest in good faith was lost. (paras 86 & 88)

(8) In the face of the suspicious and uncertain circumstances under which the transaction was transacted, the defendant still proceeded to disburse the loan to Nagarajan and created the charge on the land without making further inquiries. The courts would be slow to assist a chargee who failed to take ordinary precautions that ought to have been undertaken before registering the charged land and, as such, are not entitled to the protection of the court. Further, the element of 'carelessness and negligence' also negated good faith on the part of the defendant. Therefore, the defendant lacked good faith in the entire transaction and thereby its statutory defence of being a purchaser in good faith under the proviso to s. 340(3) of the NLC was defeated. The charge created in favour of the defendant was therefore defeasible. (paras 88, 90 & 91)

(9) Question (i) was answered in the affirmative. In answering question (ii), it was held that the general rule is that the knowledge of a solicitor is regarded by law as the knowledge of the client. An exception to the rule is only admitted where the solicitor is complicit in fraud. The order of the High Court was thus reinstated *albeit* on different grounds. (paras 93 & 94)

Bahasa Malaysia *Headnotes*

Si mati, Nagamuthu a/l Periasamy, ialah pemilik berdaftar asal tanah. Pada atau sekitar 16 Mei 2006, anak lelaki si mati, Nagarajan, memindah milik tanah tersebut secara penipuan kepada dirinya sendiri. Seorang bernama P Thirumalai bertindak sebagai peguam cara bersama bagi si mati dan Nagarajan ('peguam cara'). Kemudian, berikutan surat tawaran bertarikh 18 Oktober 2006 dan perjanjian kemudahan bertarikh 22 Februari 2007, responden, Public Bank Bhd ('defendan') memberi pinjaman tetap sejumlah RM100,000 kepada Nagarajan dan seorang bernama Sithra Velusamy. Dalam transaksi ini, peguam cara yang bertindak bagi Nagarajan, turut bertindak bagi defendan. Gadaian, yang berpihak kepada defendan, dibuat atas tanah tersebut. Apabila si mati mengetahui tentang pindah milik secara penipuan itu, si mati memulakan tindakan terhadap Nagarajan untuk mendapatkan kembali tanah itu, mendakwa bahawa pindah milik tanah adalah secara penipuan ('guaman 2007'). Selepas perbicaraan penuh, Mahkamah Tinggi Muar membenarkan tuntutan si mati dan mengisytiharkan pindah milik tanah kepada Nagarajan tidak sah kerana diperoleh secara penipuan dan pindah milik itu diketepikan dengan sewajarnya. Keputusan tersebut disahkan oleh Mahkamah Rayuan. Usul Nagarajan ke Mahkamah

Persekutuan untuk kebenaran merayu juga ditolak. Rayuan ini timbul susulan dimulakan oleh perayu ('plaintif'), sebagai pentadbir harta pusaka si mati, berkaitan dengan gadaian terhadap tanah berpihak pada defendan ('guaman 2013'). Tuntutan plaintif, secara asasnya, adalah bahawa hak milik defendan, sebagai pemegang gadaian berdaftar tanah, boleh disangkal dan tidak sah kerana Nagarajan didakwa memperoleh tanah secara penipuan dan oleh itu, gadaian tersebut boleh disangkal oleh unsur penipuan dan boleh diketepikan. Dalam pembelaannya, defendan bersandar pada s. 340 Kanun Tanah Negara ('KTN') untuk mendapatkan hak milik tak boleh disangkal tertunda dengan menghujahkan bahawa ia tiada pengetahuan tentang pemerolehan tanah tersebut secara penipuan atau secara tidak wajar oleh Nagarajan daripada si mati. Bahagian penting pembelaan adalah bahawa gadaian tersebut tak boleh disangkal kerana defendan memperoleh kepentingan terkemudian dalam tanah sebagai pemegang gadaian berdaftar dengan suci hati bagi balasan bernilai. Mahkamah Tinggi membenarkan tuntutan plaintif dan memutuskan, antara lain, bahawa (i) gadaian tersebut boleh disangkal kerana tanah tersebut dipindah milik secara penipuan walaupun defendan tiada pengetahuan tentang penipuan tersebut; (ii) gadaian tersebut tidak sah dari segi undang-undang kerana ia berasaskan instrumen pindah milik yang batal, mempertimbangkan bahawa pindah milik tanah daripada si mati kepada Nagarajan dibuat secara fraud; dan (iii) prinsip *nemo dat quod non habet* akan mematahkan kedudukan defendan sebagai pembeli suci hati terkemudian tanah kerana Nagarajan tidak memperoleh hak milik sah. Walau bagaimanapun, Mahkamah Rayuan dalam mengakas keputusan tersebut memutuskan bahawa Mahkamah Tinggi gagal mempertimbangkan bahawa defendan adalah pembeli terkemudian secara suci hati bagi balasan bernilai dan oleh itu, dilindungi bawah proviso s. 340 KTN. Oleh itu, rayuan plaintif ini atas persoalan undang-undang: (i) sama ada pengetahuan pihak peguam cara dalam tuntutan yang membentuk bebanan atas sebidang tanah terletak pada anak guamnya bagi tujuan s. 340(3) KTN; dan (ii) sama ada prinsip doktrin notis konstruktif tidak terpakai bagi sistem Torrens, iaitu, pengetahuan ejen ('peguam cara') mengenai penipuan tidak boleh terletak pada pengetahuan anak guamnya, betul dari segi undang-undang (*Doshi v. Teoh Tong Lay*).

Diputuskan (membenarkan rayuan dengan kos)
Oleh Azahar Mohamad HMP menyampaikan penghakiman mahkamah:

(1) Terma 'pembeli' dalam proviso kepada s. 340(3) tidak terhad pada seseorang yang memperoleh tanah tetapi merangkumi seseorang yang memperoleh kepentingan dalam tanah tersebut, seperti bank pemegang gadaian. Terma 'kepentingan' termasuk gadaian iaitu kepentingan berdaftar melibatkan tanah. Seksyen 5 KTN mentakrifkan 'pembeli' sebagai seorang atau sebuah badan yang, secara suci hati dan bagi balasan berfaedah, memperoleh hak milik kepada, atau apa-apa kepentingan, dalam tanah. Seksyen 241(1) KTN membenarkan gadaian

dibentuk atas mana-mana tanah yang diberi hak untuk menjamin bayaran balik apa-apa hutang. Setiap gadaian yang dibentuk bawah KTN berkuat kuasa selepas pendaftaran. Oleh itu, defendan terangkum dalam definisi 'pembeli' dalam proviso pada s. 340(3) dan oleh itu, pembeli terkemudian bawah proviso tersebut.

(2) Pembeli terkemudian, secara suci hati dan bagi balasan bernilai, menikmati keistimewaan daripada tuntutan bertentangan terhadap hak miliknya. Oleh itu, dalam persaingan tuntutan antara pemilik asal dan pembeli terkemudian secara suci hati dan bagi balasan bernilai, pembeli terkemudian berhak mendapat milikan tanah tersebut. Ketaksangkalan diberi kepada pemilik berdaftar semasa, dan bukan pemilik berdaftar terdahulu. Ini adalah perlindungan yang diberi kepada pemeroleh kepentingan terkemudian.

(3) Undang-undang mengiktiraf dan menguatkuasakan kaedah yang mengatasi di mana dalam membuat dan melaksanakan transaksi pemindahhakan yang biasanya berkait dengan sejumlah transaksi dan urusan pindah milik harta tanah, pihak-pihak perlu bertindak secara suci hati. Tidak mencukupi bagi seseorang pembeli semata-mata menunjukkan ketiadaan penipuan, penipuan atau ketidakjujuran; pengetahuan pertikaian mengenai milikan harta dan pengetahuan dakwaan penipuan, sebagai contoh, untuk membatalkan niat baik.

(4) Jelas daripada surat kepada peguam cara bertarikh 25 Julai 2006 oleh Tetuan Ramesh, Vassn & Co, yang bertindak bagi pihak si mati, bahawa peguam cara mempunyai pengetahuan jelas tentang kewujudan tuntutan bertentangan atau berlawanan atas tanah tersebut, dan lebih penting lagi, tentang dakwaan bahawa 'the transfer of the said property from Nagamuthu a/l Periasamy to your client was conducted fraudulently'. Oleh itu, peguam cara terlibat secara aktif dalam pertikaian milikan tanah antara si mati dan Nagarajan.

(5) Undang-undang am berkaitan prinsipal dan ejen digunakan dalam fakta sebenar di sini untuk menjawab persoalan sama ada pengetahuan peguam perlu dikaitkan dengan bank pemegang gadaian. Pengetahuan berkait, di mana terpakai, membentuk anggapan bahawa prinsipal mempunyai pengetahuan sebenar, apa yang diketahui ejen. Tidak boleh dinafikan bahawa hubungan antara defendan dan peguam cara adalah seperti prinsipal dan ejen. Undang-undang matan adalah bahawa pengetahuan peguam cara dianggap oleh undang-undang sebagai pengetahuan anak guamnya, di mana anak guam tidak boleh menyatakan bahawa peguam cara tidak mendedahkan fakta sebenar kepadanya.

(6) Pengecualian prinsip bahawa pengetahuan peguam cara adalah pengetahuan anak guam hanya boleh diterima di mana ejen (atau peguam cara) bersubahat dalam penipuan tersebut. Apabila peguam cara tidak bersubahat dalam penipuan tetapi mempunyai pengetahuan mengenainya, pengetahuan tersebut perlu dikaitkan dengan defendan. Oleh itu, pengetahuan peguam cara adalah pengetahuan defendan dan defendan terikat dengannya. Defendan memberikan pinjaman dan meneruskan dengan pendaftaran gadaian, dengan pengetahuan melalui peguam cara bahawa terdapat pertikaian serius terhadap milikan tanah tersebut dan terdapat dakwaan serius bahawa Nagarajan memperoleh hak milik tanah secara penipuan. Defendan tidak boleh menyatakan tidak menyedari tentang pertikaian dan penipuan yang didakwa.

(7) Pengetahuan fakta peguam cara diperoleh dalam transaksi sebelumnya mesti dikaitkan kepada defendan dalam perjalanan tindakan bagi defendan dalam transaksi pemindahhakan, walaupun defendan tidak berkepentingan dalam transaksi sebelum ini. Pengetahuan peguam cara tentang fakta tersebut diperoleh dalam transaksi melibatkan tanah yang sama dan kedua-dua transaksi berlaku sejurus antara satu sama lain dan amat berkait antara satu dan yang lain sehingga yang pertama jelas masih kekal dalam minda peguam cara. Defendan, oleh itu, dikaitkan dengan pengetahuan bahawa wujud pertikaian serius mengenai milikan tanah tersebut. Pengetahuan sebegini akan menjejaskan niat baik defendan dan oleh itu, status pemegang kepentingan secara suci hati telah hilang.

(8) Memandangkan hal keadaan yang menimbulkan kesangsian dan tidak menentu di mana transaksi tersebut dibuat, defendan masih meneruskan untuk mengeluarkan pinjaman kepada Nagarajan dan mewujudkan gadaian atas tanah tanpa membuat siasatan lanjut. Mahkamah tidak akan membantu pemegang gadaian yang gagal mengambil langkah-langkah pencegahan biasa yang perlu diambil sebelum mendaftarkan tanah yang digadai dan oleh itu, tidak berhak mendapat perlindungan mahkamah. Selanjutnya, unsur 'kecuaian' juga menafikan suci hati pada pihak defendan. Oleh itu, defendan tidak suci hati dalam keseluruhan transaksi dan dengan itu, pembelaan statutori sebagai pembeli suci hati bawah proviso, s. 340(3) KTN dipatahkan. Gadaian yang diwujudkan berpihak pada defendan oleh itu boleh disangkal.

(9) Soalan (i) dijawab secara afirmatif. Dalam menjawab soalan (ii), diputuskan bahawa kaedah am adalah pengetahuan peguam cara dianggap dari segi undang-undang sebagai pengetahuan anak guam. Pengecualian bagi kaedah tersebut hanya diterima apabila peguam cara bersubahat dalam penipuan. Dengan itu, perintah Mahkamah Tinggi dikembalikan, walaupun, atas alasan-alasan berbeza.

Case(s) referred to:

Abu Bakar Ismail & Anor v. Ismail Husin & Ors And Other Appeals [2007] 3 CLJ 97 CA ***(refd)***

Aik Ming (M) Sdn Bhd & Ors. v. Chang Ching Chuen And Ors & Another Case [1995] 3 CLJ 639 CA ***(foll)***

Au Meng Nam & Anor v. Ung Yak Chew & Ors [2007] 4 CLJ 526 CA ***(refd)***

Bradley v. Riches (1878) 9 Ch D 189 ***(refd)***

Breskvar v. Wall [1971] 126 CLR 376 ***(refd)***

Chin Hein Chong v. Tey Sin Sze & Anor [2017] 4 CLJ 348 HC ***(refd)***

CIMB Bank Bhd v. AmBank (M) Bhd & Ors [2017] 9 CLJ 145 FC ***(refd)***

Datuk Jagindar Singh & Ors v. Tara Rajaratnam [1983] 1 LNS 21 FC ***(refd)***

Doshi v. Yeoh Tiong Lay [1974] 1 LNS 30 FC ***(not foll)***

El Ajou v. Dollar Land Holdings Ltd [1994] 2 All ER 685 ***(refd)***

Fels v. Knowles (1906) 26 NZLR 640 ***(refd)***

Frazer v. Walker & Ors [1967] 1 AC 569 ***(refd)***

Gibbs v. Messer [1891] AC 248 ***(refd)***

Halifax Mortgage Services Ltd v. Stepsky and Another [1996] Ch 207 ***(dist)***

Hargreaves v. Rothwell [1836] 1 Keen 154 ***(refd)***

Kamarulzaman Omar & Ors v. Yakub Husin & Ors [2014] 1 CLJ 987 FC ***(refd)***

Kettlewell v. Watson [1882] 21 Ch D 685 ***(refd)***

Law Society of Singapore v. Udeh Kumar Sethuraju [2013] 3 SLR 875 ***(refd)***

Le Neve v. Le Neve [1747] 1 Ves Sen 64 ***(refd)***

Lee Tee & Anor v. Seek Lai Neo & Anor [2000] 2 CLJ 761 CA ***(refd)***

Liputan Simfoni Sdn Bhd v. Pembangunan Orkid Desa Sdn Bhd [2018] 1 CLJ 61 CA ***(refd)***

Majlis Peguam Malaysia & Ors v. Raja Segaran Krishnan & Other Appeals [2004] 4 CLJ 239 CA ***(refd)***

Metramac Corporation Sdn Bhd v. Fawziah Holdings Sdn Bhd [2006] 3 CLJ 177 FC ***(refd)***

O'Keefe v. London and Edinburgh Insurance Co Ltd (1) [1928] Nl 85 ***(refd)***

Ong Ban Chai v. Seah Siang Mong [1998] 3 CLJ 637 CA ***(refd)***

Oversea-Chinese Banking Corp Ltd v. Lee Tan Hwa & Anor And Another Case [1989] 1 CLJ 458; [1989] 2 CLJ (Rep) 198 HC ***(refd)***

Pandit Ram Narain v. The State of Uttar Pradesh and Ors AIR 1957 SC 18 ***(refd)***

Pekan Nenas Industries Sdn Bhd v. Chang Ching Chuen & Ors [1998] 1 CLJ 793 FC ***(refd)***

Pembangunan Orkid Desa Sdn Bhd v. Liputan Simfoni Sdn Bhd & Ors [2016] 1 CLJ 664 HC ***(refd)***

Puspavathy Thaveethu v. Majlis Perbandaran Klang & Ors And Other Appeals [2008] 6 CLJ 626 CA ***(refd)***

Rolland v. Hart (1871) LR 6 Ch App 678 ***(refd)***

Saffron Walden Second Benefit Building Society v. Rayner (1880) 14 Ch D 406 ***(refd)***

Sargent v. ASL Development Ltd [1974] 131 CLR 634 ***(refd)***

Sia Hiong Tee & Ors v. Chong Su Kong & Ors [2015] 8 CLJ 1173 FC ***(refd)***

Spector v. Ageda [1973] Ch 30 ***(refd)***

State Tailor Sdn Bhd v. Nallapan [2005] 2 CLJ 167 CA ***(refd)***

Stuart v. Kingston [1932] 32 CLR 309 ***(refd)***

Tan Ah Chim & Sons Sdn Bhd v. Ooi Bee Tat & Anor [1993] 4 CLJ 476 HC ***(refd)***

Tan Ying Hong v. Tan Sian San & Ors [2010] 2 CLJ 269 FC ***(refd)***

A *Teh Bee v. Maruthamuthu [1977] 1 LNS 134 FC* ***(refd)***
Thong Foo Ching & Ors v. Shigenori Ono [1998] 4 CLJ 674 CA ***(refd)***
Waimiha Sawmilling Company Limited (In liquidation) v. Waione Timber Co Ltd [1926] AC 101 ***(refd)***
Yap Kok Ming v. Machang Timber Sdn Bhd [1999] 1 LNS 48 HC ***(refd)***

B **Legislation referred to:**
National Land Code, ss. 5, 92, 98, 241(1), 340(2)(a), (3)

Other source(s) referred to:
Agency Law in Commercial Practice 2016 end, pp 202, 205, 207
Bowstead & Reynolds On Agency, pp 540, 543, 546
C *Bowstead & Reynolds On Agency*, 20th edn, p 1
Cordery's Law Relating To Solicitors, 5th edn, p 144
NS Bindra's Interpretation of Statutes, 10th edn, p 1636
Tan Sri Datuk Professor Ahmad Ibrahim & Judith Sihombing, *The Centenary of the Torrens System in Malaysia*, p 1

D *For the appellant - Gobind Singh Deo, S Prakash & Joanne Chua Tsu Fae; M/s Kamil Hashim Raj & Lim*
For the respondent - Chan Kok Keong, Samuel Tan Lih Yau & Denise Teoh Gaiy Eeng; M/s Shook Lin & Bok

[Editor's note: For the Court of Appeal judgment, please see Public Bank Bhd v. T Sivam Tharamalingam [2017] 7 CLJ 176 (overruled); Appeal from High Court, Muar; No. 22NCVC-78-10-2013 (affirmed).]
E

Reported by S Barathi

JUDGMENT

F **Azahar Mohamed FCJ:**

Introduction

[1] This is an appeal against the decision of the Court of Appeal which reversed the decision of the High Court after a full trial of the matter that
G arose out of a disputed registered land dealing.

[2] The dispute was about the competing claims on a same piece of land between two parties namely, the original registered owner of the land and a chargee bank, a subsequent holder of interest in the land, who were both affected by the fraud of a third party. The subject matter of the dispute
H between the two parties was whether or not a chargee bank, a subsequent holder of interest, was entitled to raise the shield of indefeasibility under s. 340 of the National Land Code ("NLC").

[3] The appeal originated from an action commenced by the appellant
I (T Sivam a/l Tharamalingam as the administrator of the estate of the deceased Nagamuthu a/l Periasamy ("deceased")) in the Muar High Court *vide* Civil Suit No: 22NCVC-78-10-2013 ("2013 suit"). The appellant was the plaintiff in the High Court. The High Court allowed the appellant's claim against the respondent (Public Bank Berhad, the defendant in the High

Court). In allowing the claim, the High Court primarily held that the registered charge over the land in question created in favour of Public Bank Berhad was invalid in law and should be cancelled immediately. The Court of Appeal reversed that decision, which eventually led to the decision being appealed against herein.

[4] We shall refer to the parties in this judgment as they were cited in the High Court.

Essential Facts

[5] The relevant facts are as follows. At all material times, the deceased was the original registered proprietor of a piece of agricultural land held under Hakmilik No. HS (M) 3612 Lot No. 913, Mukim of Rengam, District of Kluang, Johor ("land").

[6] On or about 16 May 2006, one of the deceased's sons, Nagarajan a/I Nagamuthu ("Nagarajan") fraudulently transferred the land to himself through Presentation No. 1639/2006. The solicitor who acted for the deceased and Nagarajan, as a common solicitor, was one Mr P Thirumalai ("solicitor"). On 22 June 2006, the title of the land showed that Nagarajan was the registered proprietor.

[7] Later, upon Nagarajan's and one Sithra Velusamy's ("Sithra") application, the defendant granted a fixed loan of RM100,000 to Nagarajan and Sithra pursuant to a letter of offer dated 18 October 2006 and facility agreement dated 22 February 2007.

[8] In the context of the present case, what was far more important, a memorandum of charge over the land was duly registered on 26 February 2007 under Charge Presentation No. 520/2007. In this land transaction, the solicitor who acted for Nagarajan also acted for the defendant. The defendant appointed the solicitor for the financing transaction whose duties necessitated the preparation of the security documentation for the creation of a charge over the land in favour of the defendant. As we shall explain later in the judgment, this is an important point that should be kept in mind.

[9] Insofar as the evidence goes, it is undisputed that the land was already transferred and registered in Nagarajan's name when the defendant granted the loan to the Nagarajan and Sithra, who then created a charge in favour of the defendant over the land. Thus, from the facts, the defendant was not the immediate acquirer of the interest in the land. The defendant, as the registered chargee, was the subsequent holder of interest in the land.

The 2007 Suit

[10] More significant still, when the deceased came to know of the fraudulent transfer, the deceased on 29 June 2007 brought a claim against Nagarajan at the Muar High Court *vide* Civil Suit No. 22-77-2007 ("2007 suit") to recover the land alleging that the transfer of the land was by fraudulent means.

[11] After a full trial, the Muar High Court on 18 October 2011 allowed the deceased's claim, and declared that the transfer of the land to Nagarajan was invalid as Nagarajan acquired it through fraudulent means in consideration of alleged love and affection. The High Court made a specific finding that Nagarajan had fraudulently transferred the land from the deceased. Accordingly, the High Court set aside the impugned transfer.

[12] Nagarajan appealed to the Court of Appeal. On 20 September 2012, the Court of Appeal dismissed his appeal and affirmed the Muar High Court's decision. This particular action had gone all the way to the Federal Court. Nagarajan filed a notice of motion to the Federal Court for leave to appeal, which was dismissed on 9 July 2013.

The 2013 Suit

[13] The dispute in the present case arose when the deceased discovered that Nagarajan had charged the land to the defendant. As a result, on 30 October 2013 the deceased filed the 2013 suit against the defendant, *inter alia*, for a declaration that the charge created by Nagarajan in favour of the defendant was defeasible and liable to be set aside.

[14] The plaintiff's claim against the defendant was essentially that the defendant's title as the registered chargee over the land was defeasible and not valid as Nagarajan allegedly acquired the land fraudulently. In this regard, it was alleged that the charge registered in favour of the defendant was defeasible by the element of fraud.

[15] A point to note is that the deceased passed away on 14 February 2014 and as a result, the plaintiff was substituted as the administrator of the estate of the deceased to proceed with the 2013 suit, which is the subject matter of the present appeal before us.

[16] In its defence, the defendant relied upon the proviso to s. 340(3) of the NLC to avail itself of a deferred indefeasibility of title on the charge. As an innocent party, the defendant averred that it had no knowledge of the fraudulent or improper acquisition of the land by Nagarajan from the deceased. It was an important part of the defence's case that the charge was indefeasible as the defendant acquired a subsequent interest in the land as a registered charge in good faith and for valuable consideration. The defendant was protected by the proviso to s. 340(3) of the NLC despite Nagarajan acquiring his title by fraudulent means. The defendant contended that its interest as chargee was therefore indefeasible.

[17] On 9 September 2015, the High Court allowed the plaintiff's claim and ordered, *inter alia*, that:

(a) A declaration that the charge registered on 26 February 2007 under Presentation No. 520/2007 is invalid and that the charge be cancelled immediately from the issue document of title of the land;

(b) An order that the memorandum of charge and issue document of title to the land be delivered to the plaintiff;

(c) An order that the transfer of the land under Presentation No. 1639/2006 registered on 16 May 2006 be removed from the issue document of title to the land; and

(d) An order that the plaintiff's name be registered as the proprietor of the land.

[18] The High Court made a finding that the defendant was a *bona fide* acquirer of the interest in the charge and did not have notice of any fraud. Nevertheless, the High Court then decided that the proviso to s. 340(3) of the NLC offered no protection to the defendant as the defendant was an immediate acquirer of an interest in the land.

[19] The High Court held that the charge registered on 26 February 2007 by Nagarajan in favour of defendant over the land was defeasible as the land was fraudulently transferred despite the defendant having no knowledge of the fraud.

[20] The High Court then held that the charge was invalid in law as it was based on a void instrument of transfer considering that the transfer of the land from the deceased to Nagarajan was effected by fraudulent means.

[21] The High Court held that the principle of *nemo dat quod non habet* would defeat the defendant's position as a *bona fide* subsequent purchaser in land as Nagarajan did not have good title.

Decision Of The Court Of Appeal

[22] As mentioned earlier, the Court of Appeal allowed the defendant's appeal. In allowing the appeal, the Court of Appeal held that the High Court failed to appreciate that the defendant was a subsequent purchaser in good faith and for valuable consideration and therefore, enjoyed the protection under the proviso to s. 340(3) of the NLC.

[23] The court held that the instrument of transfer from the deceased to Nagarajan was signed and validly executed by the deceased, except that it was by fraudulent means. It was undisputed that the land was already transferred and registered in Nagarajan's name when the defendant granted the loan to the Nagarajan and Sithra. Thus, from the facts, the defendant was not the immediate acquirer of the interest in the land. The defendant, as holder of the charge, was the subsequent holder of interest in the land.

[24] In any event, there was no evidence to show that the defendant had knowledge of the dispute between Nagarajan and the deceased at the material time. It was in evidence that the solicitor did not at any point in time inform the defendant of any adverse claim on the land and allegation that Nagarajan acquired the land fraudulently. Though not articulated in so many words, the court held that case law established that one could not impute knowledge of

A fraud of a solicitor as being knowledge of the client. According to the Court of Appeal, even if the solicitor could be said to have had some knowledge of the allegation of fraud, such knowledge could not be imputed to the defendant. Thus, the defendant, as the chargee, was a *bona fide* acquirer of a subsequent interest in the land for valuable consideration and who had no B notice of the alleged fraudulent transfer of the land to Nagarajan. The charge was indefeasible and the defendant was entitled to the protection by virtue of the proviso to s. 340(3) of the NLC. This was the finding of the Court of Appeal which the plaintiff sought to challenge before us.

The Questions Of Law On Appeal To The Federal Court

C

[25] This court had granted leave to the plaintiff to bring the present appeal on the following two questions of law:

Question 1

Whether knowledge on part of solicitor of claims which amount to D encumbrances over a piece of land is imputed back to his client for the purposes of s. 340(3) of the NLC?

Question 2

Whether the principle in *Doshi v. Yeoh Tiong Lay* [1974] 1 LNS 30; E [1975] 1 MLJ 85 that the doctrine of constructive notice does not apply to the Torrens system in that an agent (solicitor)'s knowledge of fraud cannot be imputed to his client, is correct in law.

Whether the principle in *Doshi (supra)* is applicable only where there is fraud on the part of the agent in the matter or also in cases whether the F said agent was not complicit in the fraud alleged himself.

[26] In the context of the present appeal, the crux of the issue posed in the two questions boils down to the single question of whether the defendant was a purchaser in good faith falling within the proviso to s. 340(3) of the NLC. If this is so, then the charge was indefeasible.

G

[27] The key to the determination of these questions centered on the proper construction of the requirement of 'good faith' in the context of a purchaser falling within the proviso to s. 340(3). This is the nub of the matter before us. There is an express requirement of good faith. At its core, is the concept H of 'good faith'. To start with, it is necessary for contextual apprehension and appreciation to set out s. 340 as a whole, with the necessary emphasis, as follows:

340. (1) The title or interest of any person or body for the time being registered as proprietor of any land, or in whose name any lease, charge or easement is for the time being registered, shall, subject to the following I provisions of this section, be indefeasible.

(2) The title or interest of any such person or body shall not be indefeasible:

(a) in any case of fraud or misrepresentation to which the person or body, or any agent of the person or body, was a party or privy; or

(b) where registration was obtained by forgery, or by means of an insufficient or void instrument; or

(c) where the title or interest was unlawfully acquired by the person or body in the purported exercise of any power or authority conferred by any written law.

(3) Where the title or interest of any person or body is defeasible by reason of any of the circumstances specified in sub-section (2):

(a) it shall be liable to be set aside in the hands of any person or body to whom it may subsequently be transferred; and

(b) any interest subsequently granted thereout shall be liable to be set aside in the hands of any person or body in whom it is for the time being vested:

Provided that nothing in this sub-section shall affect any title or interest acquired by any purchaser in good faith and for valuable consideration, or by any person or body claiming through or under such a purchaser.

[28] A fundamental point to be borne in mind is that the appeal before us was argued on the basis that Nagarajan was the immediate purchaser and that the defendant was the subsequent purchaser. As seen earlier, the legal questions posed for us to answer were premised on this footing. That much was not in dispute. What, however, is in serious dispute in the present appeal is whether the defendant was a purchaser in good faith. We are therefore constrained to hold that the High Court was plainly wrong in its finding that the defendant was an immediate purchaser.

Meaning Of 'Purchaser'

[29] The first thing to be remembered is that the term 'purchaser' in the proviso to s. 340(3) is not limited to those who acquire the land but extends to those acquiring an interest in the land, such as a chargee bank. The term 'interest' includes a charge that is a registered interest affecting land (ss. 92 and 98 of the NLC). As defined in s. 5 of the NLC, 'purchaser' means a person or body who in good faith and for valuable consideration acquires title to, or any interest, in the land. Recently, in *CIMB Bank Bhd v. AmBank (M) Bhd & Ors* [2017] 9 CLJ 145 Raus Sharif CJ in delivering the judgment of the Federal Court explained that a chargee comes within the meaning of 'purchaser' under the proviso of s. 340(3):

Section 340 of the NLC referred to indefeasibility of title or interest. Section 340(1) of NLC itself provides a clear understanding that interest means lease, charge or easement. In fact, the Privy Council in *T Damodaran v. Choe Kuan Him* [1979] 1 LNS 107; [1979] 2 MLJ 267 had

A occasion to consider the scope and meaning of 'interest' under the NLC. Lord Diplock who delivered the judgment of the court said: 'interest in land, short of proprietorship, which are capable of being registered are leases, charges and easements.

Similarly, this court in *Tan Ying Hong v. Tan Sian San & Ors* [2010] 2 CLJ
B 269 had described the legal position of a chargee as a holder of interest in land. Arifin Zakaria CJ (Malaya) (as he then was) held:

> However, we are of the opinion that the appellant bank (which is a chargee), being the holder of subsequent interest in the Land is protected by the proviso to section 340(3) of the NLC.

C The above view of Arifin Zakaria CJ (Malaya) (as he then was) is consistent with the definition of 'purchaser' in s. 5 of the NLC as:

> a person or body who in good faith and for valuable consideration acquires title to, or any interest in land.

Clearly, the definition of purchaser in s. 5 is not limited to the purchaser
D who acquires the title to land but includes those who has acquired interest in land.

[30] The undisputed evidence was that Nagarajan transferred the land to himself. Subsequently the defendant granted a fixed loan of RM100,000. As security for the loan, a memorandum of charge was duly registered in favour
E of the defendant. Section 241(1) of NLC allows a charge to be created over any alienated land to secure the repayment of any debt. Every charge created under the NLC shall take effect upon registration. Therefore, it cannot be disputed that the defendant fell within the definition of 'purchaser' in the proviso to s. 340(3). The defendant was therefore a subsequent purchaser
F under the proviso.

Deferred Indefeasibility

[31] What then is the legal effect of the charge registered in favour of the defendant? As held by this court in *Tan Ying Hong v. Tan Sian San & Ors*
G [2010] 2 CLJ 269; [2010] 2 MLJ 1, the proviso to s. 340(3) provided for deferred indefeasibility and not immediate indefeasibility. The authority established the principle that a chargee bank that was subsequent holder of interest who acquired the interest in good faith could avail itself of the protection under the proviso of s. 340(3). The chargee bank that had disbursed a loan based on the title as collateral obtained indefeasibility of the
H registered charge.

[32] The concept of indefeasibility of title is central to our Torrens system of registration of title, which provides for the registration of all titles and interests. Under it, a title is made conclusive on registration, subject however
I to statutory exceptions, so that the State guarantees that the title is unimpeachable (see *The Centenary of the Torrens System in Malaysia*, Edited by Tan Sri Datuk Professor Ahmad Ibrahim and Judith Sihombing, at p. 1).

The cardinal principle is that the register is everything, and that except in cases of actual fraud on the part of the person dealing with the registered proprietor such person upon the registration of the title under which he takes from the registered proprietor has an indefeasible title against the entire world (see *Teh Bee v. Maruthamuthu* [1977] 1 LNS 134; [1977] 2 MLJ 7 and *Fels v. Knowles* (1906) 26 NZLR 640). The concept of indefeasibility is, however, not defined in the NLC. It is worth quoting the terms in which Lord Wilberforce explained the concept in *Frazer v. Walker & Ors* [1967] 1 AC 569, a Privy Council case on appeal from New Zealand:

> The expression ["indefeasibility of title and interests"] ... is a convenient description of the immunity from attack by adverse claim to the land or interest in respect of which ... a registered proprietor enjoys. This conception is central in the system of registration. It does not involve that the registered proprietor is protected against any claim whatsoever: ... there are provisions by which the entry on which he relies may be cancelled or corrected, or he may be exposed to claims *in personam*. These are matters not to be overlooked when a total description of his rights is required. But as registered proprietor, and while he remains such, no adverse claim (except as specifically admitted) may be brought against him.

[33] In *Gibbs v. Messer* [1891] AC 248, Lord Watson in delivering the judgment of the Privy Council explained the object of deferred indefeasibility as follows:

> The object is to save persons dealing with registered proprietors from the trouble and expense of going behind the register, in order to investigate the history of their author's title, and to satisfy themselves of its validity. That end is accomplished by providing that everyone who purchases, in *bona fide* and for value, from a registered proprietor, and enters his deed of transfer or mortgage on the register, shall thereby acquire an indefeasible right, notwithstanding the infirmity of his author's title.

[34] As was pointed out in *Fraser v. Walker (supra)*, a defeasible title can provide a good root for an indefeasible title once the *bona fide* purchaser acquires a registered interest and the person who lost his title by fraud is only relegated to a claim *in personam* against the wrongdoer for damages. In *Breskvar v. Wall* [1971] 126 CLR 376 which was a decision of the High Court of Australia, a transfer which was void was nonetheless registered and it was held that upon registration of the transfer the title passed and was vested in the transferee and a subsequent purchaser from him obtained a good title.

[35] The position of a purchaser in good faith was clarified in *Puspavathy Thaveethu v. Majlis Perbandaran Klang & Ors And Other Appeals* [2008] 6 CLJ 626; [2008] 6 MLJ 672 by Richard Malanjum JCA (now CJSS) as follows:

> The proviso says that any purchaser in good faith and for valuable consideration or any person or body claiming through or under him are excluded from the application of the substantive provision of sub-s (3). For this category of registered proprietors, they obtained immediate indefeasibility notwithstanding that they acquired their titles under a

A forged document even if the instrument of transfer was forged, the respondent nevertheless obtained an indefeasible title to the said land. Thus, being a purchaser in good faith and for valuable consideration having paid within the stipulated time the balance of the purchase price arising from the public auction sale, the second intervener had acquired an indefeasible title or interest to the said land upon being registered as
B the registered proprietor.

[36] In *Sia Hiong Tee & Ors v. Chong Su Kong & Ors* [2015] 8 CLJ 1173; [2015] 4 MLJ 188, the Federal Court reiterated the concept of deferred indefeasibility as embodied in s. 340(3) of the NLC as follows:

C In the circumstances where the title or interest is subsequently transferred, section 340(3) provides that the subsequent proprietor or transferee will similarly obtain a defeasible title or interest. However, where the subsequent proprietor or transferee acts in good faith and gives valuable consideration for the title or interest in question, the proviso to section 340(3) confers protection on such a subsequent proprietor or transferee
D such that his title or interest will be indefeasible. In effect, section 340 introduces what is called the concept of deferred indefeasibility (*Tan Ying Hong v. Tan Sian San & Ors*).

[37] The position of a purchaser in good faith was further explained by this court in *Kamarulzaman Omar & Ors v. Yakub Husin & Ors* [2014] 1 CLJ 987
E where Jeffrey Tan FCJ said:

If the title or interest is registered in the name of an immediate purchaser, the *bona fides* of the immediate purchaser will not offer a shield of indefeasibility. The title or interest of an immediate purchaser is still liable to be set aside if any of the vitiating elements as set out in s. 340(2) has
F been made out. If the title or interest is registered in the name of a subsequent purchaser, then the vitiating elements in 340(2) would not affect the title or interest of a *bona fide* subsequent purchaser. The title or interest of a subsequent purchaser is only liable to be set aside if the subsequent purchaser is not a *bona fide* subsequent purchaser. The title or interest acquired by a subsequent purchaser in good faith and for valuable
G consideration, or by any person or body claiming through or under such a subsequent purchaser, is indefeasible.

[38] A subsequent purchaser in good faith is therefore entitled to raise the shield of indefeasibility. In other words, a registered interest of a subsequent purchaser can only be liable to be set aside if the interest is acquired not in
H good faith. To be more specific, a subsequent purchaser in good faith and for valuable consideration enjoys immunity from adverse claim to his title. For that reason, as between the competing claims of the original owner and the subsequent purchaser in good faith and for valuable consideration, the latter would be entitled to ownership of the subject land. Indefeasibility is
I conferred on the current registered proprietor, and not a former registered proprietor. This is a statutory protection accorded to a subsequent acquirer of interest.

[39] Reverting to the present case, on the issue of whether the defendant was a subsequent holder of interest in good faith, what had become the bone of contention between the parties was the question of attribution of the knowledge of the solicitor to the defendant. In the first place, the proof that one is a purchaser in good faith lies on the person asserting it (see *Abu Bakar Ismail & Anor v. Ismail Husin & Ors and Other Appeals* [2007] 3 CLJ 97). The contending views of parties may be summarised as follows.

[40] Learned counsel for the plaintiff submitted that the defendant was not a registered chargee in good faith on account of the defendant's solicitor having full knowledge of the existence of the adverse claim over the land in question and the allegation that Nagarajan acquired the land fraudulently from the deceased. It had been argued with some refinement that the knowledge of the solicitor could be implied or imputed to the defendant. Hence, he argued, the defendant was not entitled to the defence under the proviso to s. 340(3) for the reason that there was a lack of good faith on the part of the defendant.

[41] In resisting the appeal, the position taken by the defendant was somewhat quite straightforward. The defendant's contention was simply this. The defendant's charge was indefeasible as the defendant was a subsequent holder of an interest in the land as a registered chargee in good faith and for valuable consideration. Hence, the proviso to s. 340(3) of the NLC was applicable to the defendant despite the transfer to Nagarajan had been obtained by fraudulent means. The defendant maintained all along that it had no knowledge of the adverse claim on the land. That being so, learned counsel submitted that the finding by the High Court which was upheld by the Court of Appeal that the defendant was a *bona fide* purchaser rendered the leave questions academic, redundant, and incapable of reversing the decision of the Court of Appeal. According to learned counsel, there was in effect no question of law to be answered.

[42] As to the point raised by learned counsel for the defendant that the High Court made a finding that the defendant was a *bona fide* purchaser, after reading the entire judgment of the High Court we found that in point of fact the High Court never dealt with the said issue in its judgment. The relevant passage of the judgment of the High Court thus reads:

> Oleh itu proviso di bawah Seksyen 340 Kanun Tanah Negara 1965 tidak terpakai kepada Defendan. Walaupun Defendan telah membuktikan bahawa carian telah dibuat terhadap hakmilik hartanah bagi membuktikan bahawa ia adalah pembeli '*bona fide*' dan telah membuktikan tidak ada notis diserahkan mengenai kewujudan frod dalam pemilikan hartanah oleh Nagarajah a/l Nagamuthu, Defendan masih tidak boleh menggunapakai proviso di bawah seksyen 340 Kanun Tanah Negara 1965 memandangkan Gadaian tersebut berdasarkan instrument yang tidak sah dan dengan itu perlu diketepikan ...

[43] It is apparent from above that the High Court was merely drawing an analogy that the proviso to s. 340(3) did not apply in favour of the defendant even if the defendant manages and/or able to prove that it was a *bona fide* purchaser.

Good Faith

[44] The rival contentions of the parties first bring into sharp focus the meaning of 'good faith' within the context of the proviso to s. 340(3) of the NLC. As we have seen earlier, the meaning of 'good faith' is a matter of importance in this case. What does the term mean? 'Good faith' is a weighty phrase. It implies, according to *Concise Oxford English Dictionary*, 11th edn, honesty or sincerity of intention. According to the authors of *NS Bindra's Interpretation of Statutes*, 10th edn p. 1636, 'good faith' includes due inquiry and implies not only an upright mental attitude, and clear conscience of a person, but also the doing of an act, showing that ordinary prudence has been exercised according to the standards of a reasonable person. According to the authors, 'good faith' contemplates an honest effort to ascertain the facts upon which exercise of the power must rest; it must, therefore, be summed up as 'an honest determination from ascertained facts'. The authors stated that 'good faith' precludes pretence or deceit, and also negligence and recklessness. The authors further said although the phrase may vary in the context of different statutes, subjects and situations, honest intent free from taint or fraud, or fraudulent design, is a constant element of its connotation.

[45] As a general statement of a broad legal proposition, the meaning of words and expressions used in an Act must take their colour from the context in which they appear (per SK Das J in *Pandit Ram Narain v. The State of Uttar Pradesh and Ors* AIR 1957 SC 18 quoted with approval by our Federal Court in *Metramac Corporation Sdn Bhd v. Fawziah Holdings Sdn Bhd* [2006] 3 CLJ 177; [2006] 4 MLJ 113). The meaning and scope of the phrase is, therefore, to be considered in the light of the scheme and purpose of the section in which the phrase occurs. In this regard, security of title by registration lies at the very heart of our country's system of land ownership.

[46] In our opinion, the existence of good faith or otherwise would depend on the particular facts of each case; it is a question of fact in each case for the court to determine on the evidence. The overriding consideration is 'the particular circumstances of each case'. (See *Pekan Nenas Industries Sdn Bhd v. Chang Ching Chuen & Ors* [1998] 1 CLJ 793; [1998] 1 MLJ 465 and *State Tailor Sdn Bhd v. Nallapan* [2005] 2 CLJ 167; [2005] 2 MLJ 589). This was shown in a number of cases by which justice was done in a range of factual circumstances. We need not go through all the cases here. We would only draw attention to two decisions of our courts. These two cases illustrate this point very well.

[47] First, is the case of *Datuk Jagindar Singh & Ors v. Tara Rajaratnam* [1983] 1 LNS 21; [1983] 2 MLJ 196. In that case, in the context of the person who was applying to set aside a registered title or interest that was defeasible by virtue of s. 340(2) and which was now in the hands of a subsequent purchaser, Lee Hun Hoe CJ Borneo in delivering the judgment of the Federal Court said:

> In order to maintain any sort of claim against Arul the respondent would first have to succeed against Suppiah and impeach his title. Under the National Land Code in order to succeed against Arul, the respondent must prove against him that at or prior to the time he obtained registration and title to the property, he was either fraudulent, which means that he was a party to the fraud, or had knowledge of the fraud.

[48] Therefore a purchaser who is not guilty of any fraud but who has knowledge that his predecessor's title or interest is tainted with fraud is not entitled to the benefit of the proviso under s. 340(3). In the circumstance of that case, it was held that mere knowledge of the fraud would suffice to negate good faith.

[49] The second case is *Au Meng Nam & Anor v. Ung Yak Chew & Ors* [2007] 4 CLJ 526; [2007] 5 MLJ 136 where in holding that a purchaser in good faith did not include a purchaser who was careless or who had been negligent, Raus Sharif JCA (as His Lordship then was) in discussing the element of good faith explained:

> Further, had the evidence adduced in this case been properly considered and assessed by the learned trial judge, a reasonable inference would be that the first defendant knew at the time he bought the said land, the purchase price was below the market value. But he wanted to take advantage of the low price. He did a fast track to complete the purchase. In doing so he disregarded his obligations to investigate the alleged proprietors and the genuineness of the documents. My respectful view is that a purchaser in good faith does not include a purchaser who is careless or who had been negligent. In *Oliver v. Hinton* [1899] Chancery Division 264 Lindley MR said:
>
> To allow a purchaser who acts with such gross carelessness to deprive a prior innocent mortgagee of her priority would be the greatest injustice.
>
> So too here. The first defendant is under the obligation to investigate properly all matters relating to the sale of the said land and not to just blindly accept what was claimed by the 'vendors' as correct and genuine. When he failed to take the ordinary precautions which ought to be taken in such a matter he is not entitled to the protection of the court.

[50] The principle underlying the above cases is that the law recognises and enforces an overriding rule that in making and carrying out conveyancing transaction that commonly deals with a number of transactions and dealings to transfer real property, parties should act in good faith. Good faith, therefore, does not simply mean absence of fraud, deceit or dishonesty; it

A also requires acting honestly, reasonably or fairly (see *Stuart v. Kingston* [1923] 32 CLR 309 and *Pekan Nenas Industries Sdn Bhd (supra)*]. The elements of good faith are not closed; it must in all cases depend upon the circumstances. It is not enough for a purchaser to merely show absence of fraud, deceit or dishonesty; knowledge of a dispute as to the ownership of
B property and knowledge of fraud allegation, for example, could vitiate good faith.

[51] It is necessary to point out that the concept of purchaser in good faith under the proviso to s. 340(3) is not the same to the assessment of establishing fraud under s. 340(2)(a). In *Ong Ban Chai v. Seah Siang Mong* [1998] 3 CLJ
C 637; [1998] 3 MLJ 346 the Court of Appeal held that good faith under the provisions of s. 340(3) meant the absence of fraud, deceit or dishonesty. In holding that mere knowledge of an adverse claim did not vitiate good faith, the Court of Appeal relied on *Pekan Nenas Industries Sdn Bhd*. With respect, the Court of Appeal in *Ong Ban Chai v. Seah Siang Mong* failed to appreciate
D that in *Pekan Nenas Industries Sdn Bhd* the Federal Court was not dealing with s. 340(3) of the NLC. The Federal Court did not deal with the issue of 'good faith' under the proviso to s. 340(3). When the Federal Court referred to the case of *Waimiha Sawmilling Company Limited (In liquidation) v. Waione Timber Co Ltd* [1926] AC 101 it was in the context of dealing with the issue
E of 'fraud' under s. 340(2)(a) of the NLC, and not the meaning of 'good faith' under the proviso to s. 340(3). To this extent, in our opinion, the Court of Appeal in *Ong Ban Chai v. Seah Siang Mong* misapprehended the terms of the judgment of the Federal Court in *Pekan Nenas Industries Sdn Bhd* in that, as held by the High Court in *Pembangunan Orkid Desa Sdn Bhd v. Liputan Simfoni Sdn Bhd & Ors* [2016] 1 CLJ 664 and the Court of Appeal in *Liputan Simfoni*
F *Sdn Bhd v. Pembangunan Orkid Desa Sdn Bhd* [2018] 1 CLJ 61, it had erroneously conflated the concepts of 'fraud' under s. 340(2)(a) and 'good faith' under the proviso to s. 340(3).

[52] This then brings us back to the present case. In addressing the leave
G questions, the important points that require to be kept in mind that cannot be overlooked, are first, the solicitor acting for the defendant was also the solicitor who acted for Nagarajan, and secondly, no allegations of fraud were made personally against the solicitor.

[53] As seen earlier, the land was fraudulently transferred from the
H deceased to Nagarajan on 16 May 2006. On 15 July 2006 the deceased lodged a police report stating that Nagarajan obtained title to the land by fraud. Next, on 18 July 2006, the solicitor acting for Nagarajan sent a notice to the deceased demanding delivery of vacant possession of the land. The material part of the notice reads:

I > We are the Solicitors for Mr. Nagarajan A/L Nagamuthu of No. 29, Jalan Sahabat, Taman Emas, 86000 Kluang, Johor with instruction to act herein.

> We are instructed that our client is the registered owner of 3.7636 hectares of the property held under HS (M) 3612 PT LOT 913, Mukim Rengam, Johor.
>
> We are informed that you or your agent or servants have been in occupation of the said property and working harvesting the oil palm fruits for your own benefits.

The notice went on:

> Our client instructs that he intends to clear the said land for the purpose of utilising the same for the operation of his own business.
>
> Therefore, our instructions are to give you NOTICE TO QUIT and deliver up vacant possession of the said land within one (1) month of date hereof.
>
> TAKE NOTICE that unless you vacate the said land within one (1) month from the date hereof, we have further instruction to institute ejectment proceeding against you or your agent or servants for which you will be liable for all legal cost incurred therefrom.

[54] On 19 July 2006 the deceased affirmed a statutory declaration stating that Nagarajan obtained the title to the land by fraud. Then, Messrs Ramesh Vassn & Co acting for the deceased sent a letter dated 25 July 2006 to the solicitor indicating that there was a dispute as to the ownership of the land and further alleging that Nagarajan obtained title to the land by fraud. The contents of the letter are so striking that we think it right to reproduce it *in extenso*, with the necessary emphasis:

> REF: NOTICE OF DEMAND - TO GIVE VACANT POSSESSION OF LAND HELD UNDER HS (M) 882 PT LOT 913 NOW HS (M) 3612 LOT 913 MUKIM RENGAM
>
> We refer to the above matter wherein we act for Mr. Tharmalinggan a/I Nagamuthu, Amayappan a/l Nagamuthu, and Chinamuthu a/I Nagamuthu who has handed over your letter of demand dated 18.7.2006 with instructions to reply thereto.
>
> We understand that your good office has also served similar notices to the other lawful children apart from the above named. Please forward copies of all the notices for our reference and action. We confirm that we are acting for each of the lawful children of Nagamuthu a/I Periasamy.
>
> Having stated the above, we hereby state our client's contention:
>
> 1. *In regards to your client's allegation that he is the lawful owner of the said property, our clients contend that the transfer of the said property from Nagamuthu a/I Periasamy to your client was conducted fraudulently and as such we have been instructed to apply to the High Court to set aside the registration of the transfer. We shall be making the Land Office as a party to the suit. In light of the above, kindly confirm as to whether your good office has instructions to accept service of process on behalf of your client.*

A

2. In regards to your client's allegation that he intends to clear the said land for his own business, is strongly objected to by our clients based on the contention as mentioned above;

3. In reference to your client giving a notice to quit and to deliver vacant possession, we have been instructed to oppose any suit that may be brought by your client to the effect.

B

4. In the event you have instructions to proceed further, we have instructions to accept service of process for our clients.

We believe that since the ownership of the said property is in contention despite your client being the registered owner as mentioned in your letter, we would insist that the current status quo be maintained until the disposal of the case. In any event, if your good office is not amenable to the above then we shall obtain a court order to the said effect.

C

Please be informed that we have forwarded a letter to your good office in respect of the said property in question and please consider as to whether there would be a conflict of interest on your good office part to act for your client.

D

[55] On the above review of the letters, we have no doubt that a serious dispute thereof had arisen at the material time between the deceased and Nagarajan on the ownership of the land. From this letter, it is beyond doubt that the solicitor had explicit knowledge of the existence of an adverse or rival claim on the land, and more importantly of the allegation that 'the transfer of the said property from Nagamuthu a/l Periasamy to your client was conducted fraudulently'. This is an important point to remember. The deceased's solicitor had demanded for '*status quo*' to be maintained of the land pending the disposal of an impending court action. One could see that at the material time, the solicitor was actively involved in the dispute as to the ownership of the land between the deceased and Nagarajan.

E

F

[56] It was against the above background that the solicitor was appointed as the defendant's loan documentation solicitor in respect of the loan that was granted to Nagarajan and Sithra. Clearly, there was a duty on the solicitor to communicate that knowledge of facts to the defendant. The information was material because it affected the defendant's interest.

G

[57] Nonetheless, despite having knowledge of the existence of a dispute as to the ownership of the land, the solicitor prepared and attested the facilities agreement dated 22 February 2007 between the defendant and Nagarajan as a common solicitor. By letter dated 26 February 2007, the solicitor advised the defendant to release the loan of RM100,000 to Nagarajan. The solicitor subsequently proceeded to register the said charge on 26 February 2007 in favour of the defendant.

H

I

[58] The central question that we must then ask here is to what extent would the solicitor's knowledge be imputed to the defendant? This case turned principally upon this question. It is to this important question we now turn.

Whether Knowledge Of The Solicitor Should Be Imputed To The Chargee Bank?

[59] To answer this key question, we have to apply the general law of principal and agent to the actual facts of the present case; it is essentially a question of agency law. As stated by *Bowstead & Reynolds On Agency* 20th edn at p. 1, agency is the fiduciary relationship which exists between two persons, one of whom expressly or impliedly manifests assent that the other should act on his behalf so as to affect his relations with third parties, and the other of whom similarly manifests assent so to act or so acts pursuant to the manifestation. The one on whose behalf the act or acts are to be done is called the principal. The one who is to act is called the agent.

[60] One of the legal consequences that follow from this fiduciary relationship is that as the agent is an intermediary, the knowledge of an agent can and must sometimes be imputed to the principal. This is a notice through an agent. The concept of imputed knowledge need to be kept separate from the concept of constructive knowledge. Imputed knowledge, where it operates, deems the principal to have the actual knowledge, which the agent has (see *Bowstead & Reynolds On Agency*, p. 543). Constructive notice is "a kind of notice which the courts have inferred against a person from his wilfully abstaining from making inquiry or inspecting documents" (per Fry J in *Kettlewell v. Watson* [1882] 21 Ch 685). The law will not allow a person to deny knowledge of facts that his agent knew. As explained by the authors of *Agency Law in Commercial Practice*, 2016 edn at p. 202: the process of imputation treats knowledge held by the agent as the knowledge of his or her principal. It operates where knowledge is relevant to the legal relationship between two persons, but is held only by an agent. Since it is the duty of the agent to convey such facts to the principal, the law presumes the agent has done so without placing upon any one the onerous undertaking of actually establishing it.

[61] It is irrefutable that the relationship between the defendant and the solicitor was that of a principal and agent (see *Cordery's Law Relating To Solicitors*, 5th edn, p. 144). The solicitor was an agent of the defendant. If one looks at the matter as a question of principle, it is well-settled law as held by the Federal Court in *Doshi v. Yeoh Tiong Lay* that the knowledge of a solicitor is regarded by law as the knowledge of the client, so that it is not open to the client to say that the solicitor did not disclose the true facts to him. The High Court of Australia in *Stuart v. Kingston* [1932] 32 CLR 309 held that the knowledge of the solicitor is to be treated as knowledge of his client. In *Bradley v. Riches* [1878] 9 Ch D 189, in explaining the rule that the knowledge of the solicitor is the imputed knowledge of the client, Fry J said:

> If the circumstances of the case are such as in the ordinary course of business between solicitor and client they are, then the solicitor must be assumed to have communicated the fact to his client, and the knowledge of the agent is, to use the language of Lord Chelmsford in *Espin v.*

A *Pemberton*, the imputed knowledge of the client. It appears to me to be clear that that presumption or imputation is a thing which the client cannot be allowed to rebut.

[62] In *Lee Tee & Anor v. Seek Lai Neo & Anor* [2000] 2 CLJ 761; [2000] 1 MLJ 466, the solicitor who was acting for the second and third defendants
B at the time when the agreement was prepared admitted that he knew there was in existence a sale and purchase agreement between the first defendant and the plaintiffs in respect of the same property. In holding that the knowledge of a solicitor is regarded by law as the knowledge of the client, the Court of Appeal held:

C In the present appeal the second and third defendants pleaded that they were *bona fide* purchasers without notice and thus protected by s. 340 of the National Land Code 1965. The learned judge dealt with this point based on the evidence adduced before him. The learned judge in his judgment stated that the solicitors who were acting for the second and third defendants at the time when the second agreement was prepared,
D Mr Lim Seng Bok (DW2), admitted that he knew there was in existence a sale and purchase agreement between the first defendant and the plaintiffs in respect of the same property. The learned judge went on to say that by reason of the decision of *Aik Ming (M) Sdn Bhd & Ors v. Chang Ching Chuen & Ors* [1995] 2 MLJ 770, it is settled law that the knowledge
E of a solicitor is regarded by law as the knowledge of the client except where the solicitor acted fraudulently. The learned judge found that since the solicitor had knowledge of the first agreement, the second and third defendants were deemed to have knowledge of the existence of the first agreement. It is up to the parties then to make the necessary search and enquiries that the first agreement had been effectively terminated.
F Otherwise, the learned judge was of the view that the parties were not protected by the doctrine of *bona fide* purchasers. For that reason the learned judge found that the second and third defendants were not *bona fide* purchasers without notice. Though the decision of *Aik Ming* had been reversed by the Federal Court, the principle referred to by the learned judge was affirmed.

G **[63]** In *Aik Ming (M) Sdn Bhd & Ors. v. Chang Ching Chuen & Ors & Another Case* [1995] 3 CLJ 639 the Court of Appeal ruled:

The second proposition which I accept as well settled is that the knowledge of a solicitor is regarded by the law as the knowledge of the client.

H **[64]** The application of the principle can be seen in *Tan Ah Chim & Sons Sdn Bhd v. Ooi Bee Tat & Anor* [1993] 4 CLJ 476; [1993] 3 MLJ 633, *Thong Foo Ching & Ors v. Shigenori Ono* [1998] 4 CLJ 674; [1998] 4 MLJ 585, *Oversea-Chinese Banking Corp Ltd v. Lee Tan Hwa & Anor And Another Case*
I [1989] 1 CLJ 458; [1989] 2 CLJ (Rep) 198; [1989] 1 MLJ 261, *Majlis Peguam Malaysia & Ors v. Raja Segaran Krishnan & Other Appeals* [2004] 4 CLJ 239; [2005] 1 MLJ 15 and *Yap Kok Ming v. Machang Timber Sdn Bhd* [1999] 1 LNS 48; [1999] MLJU 643.

[65] There is one qualification to be made through concerning the case of *Doshi v. Yeoh Tiong Lay*. It is necessary to make the point that even though the Federal Court had stated the general principle that the knowledge of a solicitor was regarded by law as the knowledge of the client, it went a step further to state an exception to this rule in cases of fraud, in the following terms:

> There is, however, an important exception to the above rule in cases of fraud, which is stated in *Halsbury's Laws of England* (3rd Ed.) Vol. 14, paragraph 1019 at page 543 as follows:
>
> > Under the head of actual notice is included notice to an agent employed in the transaction. The notice is imputed to the principal, and it affects him whether communicated to him or not; **but an exception is admitted where there has been fraud on the part of the agent in the matter**. Although actual communication to the principal is not required, yet fraud excludes in practice all probability of communication, and hence the knowledge of the fraudulent agent is not imputed to the principal.

[66] Having quoted the exception above, the Federal Court then went on to state, with the necessary emphasis, as follows:

> **It is thus clear that his solicitor's knowledge of fraud, if any, cannot be imputed to the respondent**. I must therefore reject the appellant's contention that if the respondent had notice by his agent of the previous transactions, then his entering into an agreement to purchase the premises was tantamount to fraud.

[67] Was the Federal Court correct in stating, "It is thus clear that his solicitor's knowledge of fraud, if any, cannot be imputed to the respondent" Before us, learned counsel for the plaintiff brought to our attention that the exception stated by *Halsbury's Laws of England* that "… an exception is admitted where there has been fraud on the part of the agent in the matter" is quite different from the statement of the court in *Doshi v. Yeoh Tiong Lay* that "it is thus clear that his solicitor's knowledge of fraud if any, cannot be imputed to the respondent". It appears that what was said by the Federal Court in *Doshi v. Yeoh Tiong Lay* implied that the solicitor's knowledge of fraud cannot be imputed to the client generally, regardless of whether the solicitor is complicit in the said fraud or not. With respect, we do not agree. We accept that like all general rules there are exceptions. In our opinion, an exception to the principle that the knowledge of a solicitor is the knowledge of the client is only admitted where the agent (or solicitor) is complicit in the said fraud. The law imputes to the principle knowledge of facts which the agent knows except where a prior fraud committed by the agent which makes it certain the agent would conceal the knowledge.

[68] In this, we agree with the Court of Appeal in *Aik Ming (M) Sdn Bhd & Ors v. Chang Ching Chuen & Ors and Another Appeal (supra)* where it was held:

> The second proposition which I accept as well settled is that the knowledge of a solicitor is regarded by the law as the knowledge of the client. The only exception to this is where the solicitor acts fraudulently *vis-à-vis* his client. I cite once again from *Doshi* (at p 88):
>
> ...
>
> In *Bradley v. Riches* (1878) 9 Ch D 189 it was held that the presumption that a solicitor has communicated to his client facts which he ought to have made known cannot be rebutted by proof that it was the solicitor's interest to conceal the facts.
>
> There is, however, an important exception to the above rule in cases of fraud, which is stated in 14 *Halsbury's Laws* (3rd Ed) para. 1019 (at p. 543) as follows:
>
> > Under the head of actual notice is included notice to an agent employed in the transaction. The notice is imputed to the principal, and it affects him whether communicated to him or not; but an exception is admitted where there has been fraud on the part of the agent in the matter. Although actual communication to the principal is not required, yet fraud excludes in practice all probability of communication, and hence the knowledge of the fraudulent agent is not imputed to the principal.
>
> *It is thus clear that his solicitor's knowledge of fraud, if any, cannot be imputed to the respondent. I must therefore reject the appellant's contention that if the respondent had notice by his agent of the previous transactions, then his entering into an agreement to purchase the premises was tantamount to fraud.*
> (emphasis added)
>
> There is little doubt that the words in the judgment of Gill FJ upon which I have placed emphasis were expressed in clear misunderstanding of the passage from *Halsbury* which was cited by his Lordship. Encik Das said that whatever *Halsbury* may say, the Federal Court had established an independent principle. I regret that I am unable to agree. The words 'It is thus clear' with which the proposition begins is clear indication that that proposition rests, not upon some independent theory but upon the passage from *Halsbury* that precedes it.

[69] The last passage from the judgment *Aik Ming (M) Sdn Bhd v. Chang Ching Chuen & Ors And Another Appeal* deserves particular consideration; we are in full agreement that the court in *Doshi v. Yeoh Tiong Lay* misapprehended the terms of the passage from *Halsbury* which was cited by the court. Undeniably, the passage from *Halsbury* did not support the proposition that the solicitor's knowledge of fraud cannot be imputed to the client generally, regardless of whether the solicitor is complicit in the said fraud or not. In our judgment, where the solicitor was not complicit in the fraud but had knowledge of the same, that knowledge must be imputed to the defendant.

[70] The authors of *Agency Law in Commercial Practice*, at p. 205 explained the fraud exception as follows:

> Explanations of what has been referred to as the 'fraud exception' (Rule (4) above) seem to rest on ideas of presumed communication, or rather the probable lack of communication in situations where the agent is defrauding his or her principal. It makes no sense, it is argued, to presume that the agent communicates his or her fraud to the very person he or she is defrauding. As was stated by Vaughan Williams J in *In Re Hampshire Land Company*, common sense at once leads one to the conclusion that it would be impossible to infer that the duty, either of giving or receiving notice, will be fulfilled where the common agent is himself guilty of fraud. Saville LJ pointed out that an assumption of communication in these circumstances 'offends common sense'. More recently, in *Bilta (UK) Ltd (In Liquidation) and Ors v. Nazir And Ors (No. 2)* the Justices of the Supreme Court expressed competing views on the justification of the fraud exception. Lord Sumption characterised it as a rule of public policy, Lords Neuberger and Mance considered that the question whether to attribute knowledge depended on the nature and factual context of the claim in question.

[71] It bears noting that the Court of Appeal in the present case relied entirely on *Doshi v. Yeoh Tiong Lay* to conclude that one cannot impute knowledge of fraud of a solicitor as being knowledge of the client. This is what the Court of Appeal said:

> Further, case law has established that one cannot impute knowledge of fraud of a solicitor as being knowledge of the client. Although the general rule is that the knowledge of a solicitor is that of the client, such that it is not open to the client to say that the solicitor did not disclose the true facts to him, an important exception to the general rule, is in cases of fraud. As such even if the Defendant's security documentation lawyer can be said to have had some knowledge of the allegation of fraud, such knowledge cannot be imputed to the Defendant.

[72] The Court of Appeal held that the solicitor's knowledge of the fraud allegation could not be imputed to the defendant. That being the case, the underlying basis for the Court of Appeal in the present case to justify appellate intervention was wholly misconceived and untenable. As we have explained, the exception is only admitted where the solicitor is complicit in the fraud, which is not the case in our present case. Where the solicitor was not complicit in the fraud but had knowledge of the same, this knowledge must be imputed to the defendant. Had the Court of Appeal applied the correct principle in the context of the present case, it would have concluded that the solicitor's knowledge could be imputed to the defendant. The grave fundamental error made by the Court of Appeal in the present case was its failure to apply the general principle that the solicitor's knowledge could be imputed to the defendant. It was an erroneous approach that resulted in miscarriage of justice. This, in itself is sufficient to warrant appellate interference on our part.

[73] Therefore, on the facts of the case, the knowledge of the solicitor was the knowledge of the defendant. The defendant was bound by the solicitor's knowledge. The defendant granted the loan and proceeded to register the charge, knowing through the solicitor that there was a serious dispute as to the ownership of the land and that there was serious allegation that Nagarajan obtained title to the land by fraud. On this issue, we conclude by saying that the defendant could not say that it was not aware of the dispute and the fraud allegation. But the matter did not end there though.

[74] There is another crucial issue that we need to address. The more difficult question taken by learned counsel for the defendant was whether the solicitor's knowledge acquired in a previous or different transaction could be imputed to the defendant.

Imputed Knowledge Acquired By Solicitor In A Previous Or Different Transaction

[75] Before us, the main thrust of the contention of learned counsel is that notwithstanding the general principle that the knowledge of an agent was imputed to its principal in the same transaction, such imputation was qualified and limited to the transaction in which the knowledge was obtained. He argued that on the facts herein, there were separate and subsequent transactions ie, the transfer of the land from the deceased to Nagarajan and thereafter, the registration of the defendant's charge; however, a common solicitor was involved in both the separate transactions. In the conveyance of the land, the solicitor was acting on the instruction of his principal, Nagarajan, and within the scope of his employment to the same. The solicitor subsequently acted for the defendant as its loan and security documentation lawyer in respect of Nagarajan's loan. The solicitor also acted for the defendant in the registration of the charge. Learned counsel argued that the transfer of the land and the registration of the charge were separate and subsequent transactions, as they shared different principals. The former transaction, being Nagarajan, whilst the latter transaction, being the defendant. Therefore, according to learned counsel, that knowledge of a common solicitor could not be imputed to a subsequent principal in a separate transaction.

[76] In support of his contention, learned counsel had drawn our attention to the English Court of Appeal case of *Halifax Mortgage Services Ltd v. Stepsky and Another* [1996] Ch 207, *Saffron Walden Second Benefit Building Society v. Rayner* (1880) 14 Ch D 406 and *O'Keefe v. London and Edinburgh Insurance Co Ltd* (1) [1928] Nl 85.

[77] Based on these authorities, learned counsel submitted that when the solicitor acted for Nagarajan in the transfer of the land and thereafter for the defendant in the preparation of the loan and security documents for the loan, it consisted of two separate and subsequent transactions in which the principal for the transfer was Nagarajan. The solicitor was not an agent for Nagarajan and for the defendant, concurrently in the same transaction. Thus,

it was submitted that the knowledge acquired by the solicitor as regards to the allegations of fraud pertaining to the transfer of the land, such knowledge so acquired could only be imputed to the principal of the transfer transaction, ie, Nagarajan, and not to the defendant; the solicitor was not acting for the defendant at the material time. Learned counsel submitted that the solicitor could not bind prior knowledge, ie, the allegations of fraud of the transfer of the land, to its subsequent principal, the defendant, and thus the defendant in all events, was a purchaser in good faith and for valuable consideration within the meaning of proviso to s. 340(3) of the NLC and was further not affixed with notice of fraudulent allegations.

[78] Having carefully considered these and other arguments, we are unconvinced by the defendant's contention. Our reasons now follow. In the first place, the facts of the cases cited by learned counsel for the defendant are distinguishable from the facts of the instant appeal. In *Halifax Mortgage Services Ltd v. Stepsky and Another*, the husband and his wife applied to the mortgagee for a loan. They informed the mortgagee that the loan was for their joint benefit, ie, for the purchase of shares in the family business. The husband, however, informed the common solicitor of both mortgagors and mortgagees that the true purpose of the loan was for his sole benefit, ie, for paying off the first mortgage and settling his business debts. After obtaining the loan, they fell into default. The mortgagees, obtained an order for possession but the wife contended, that the mortgage should be set aside as the knowledge of the solicitor had to be imputed to the mortgagees. On the facts it was held that a solicitor for both a borrower and a lender in the same transaction, and obtained from the borrower knowledge of some fact which it was his duty to the borrower not to disclose to the lender without the borrower's consent, knowledge of that fact was not to be imputed to the lender. *Saffron Walden Second Benefit Building Society v. Rayner* is an authority to the effect that if solicitors for a party lacked authority to receive notices, purported service upon them was ineffective to amount to service on the party. In this case, notice of an encumbrance was given to a solicitor who had been employed by trustees in all matters relating to the trust in which professional assistance was required, but who had not been authorised to receive notices on their behalf, and the solicitor wrote formally acknowledging receipt on behalf of the trustees. It was held that the notice to the solicitor did not operate as notice to the trustees, solicitors not being, as such, standing agents of their clients to receive notices on their behalf. *O'Keefe v. London and Edinburgh Insurance Co Ltd* is a case in respect of unconnected transactions in which the court observed, "The danger of making the agent's memory of bygone transactions a jury question is obvious, and recollection or forgetfulness by the agent of matters known to him previous to that relation is not allowed to affect the liability of the principal except in certain well-recognised cases."

[79] The authors of *Bowstead & Reynolds On Agency* at p. 540 summarised four rules on imputation:

(i) The law may impute to a principal knowledge relating to the subject matter of the agency which the agent acquires while acting within the scope of his authority.

(ii) Where an agent is authorised to enter into a transaction in which his own knowledge is material, knowledge which he acquired outside the scope of his authority may also be imputed to the principal.

(iii) Where the principal has a duty to investigate and make disclosure, he may have imputed to him not only facts which he knows but also material facts of which he might expect to have been told by his agents.

(iv) Knowledge is not attributed to the principal where the principal is claiming in respect of a breach of duty of his own agent, and, perhaps, where the agent is defrauding the principal in the transaction at issue.

[80] In our opinion, rule (ii) is a situation in which an agent's knowledge obtained in a different transaction or before his employment as agent can be imputed to his or her principal. In this context, Hoffmann LJ in *El Ajou v. Dollar Land Holdings Ltd* [1994] 2 All ER 685 explained that there were cases in which an agent was authorised to enter into a transaction in which his own knowledge was material. At p. 546 the authors of *Bowstead & Reynolds On Agency* said: "And it can be expected that courts will be resistant to arguments that two connected transactions were nonetheless discrete for the purposes of the rules of imputation."

[81] The application of this rule can be seen in *Le Neve v. Le Neve* [1747] 1 Ves Sen 64, where Lord Hardwicke imputed the attorney's knowledge acquired previously and another transaction to the defendant. In *Hargreaves v. Rothwell* [1836] 1 Keen 154, Lord Langdale MR said:

> Where one transaction was closely followed by, and connected with another; or where it was clear, as in the case before the Court, that a previous transaction was present to the mind of the solicitor when engaged in another transaction, there was no ground for the distinction by which the rule, that notice to the solicitor is notice to the client, had been restricted to the same transaction.

[82] In his judgment, Lord Langdale suggested that if two matters for separate principals took place so close to one another that the first matter must have been still present in the agent's mind, imputation could occur. Lord Langdale explained this by referring to the case of *Mountford v. Scott* as follows:

> In the marginal note to the case of *Mountford v. Scott*, it is said that notice to an agent, in order to bind his principal, must be in the same transaction; and this though the agent acted as attorney for the vendor and vendee. The judgment itself certainly does not [160] lay down the proposition so

absolutely as it is stated in the marginal note; but the case came upon appeal before Lord Eldon, and is reported in *Turner v. Russel* (page 274), where it appears that Lord Eldon's judgment turned upon a point entirely different, which rendered the question of notice wholly immaterial. The point upon which Lord Eldon decided the case was that, where deeds are deposited for the particular purpose of obtaining credit, the person with whom the deeds are deposited has no lien upon them for what is due to him in respect of monies previously advanced. But Lord Eldon notices the ground of the Vice-Chancellor's decision, and the observations he makes on the subject of notice are extremely important. The "Vice-Chancellor," he observes, "in this case appears to have proceeded upon the notion, that notice to a man in one transaction is not to be taken as notice to him in another transaction; in that view of the case it might fall to be considered, whether one transaction might not follow so close upon the other as to render it impossible to give a man credit for having forgotten it. I should be unwilling to go so far as to say that, if an attorney has notice of a transaction in the morning, he shall be held, in a Court of Equity, to have forgotten it in the evening; it must in all cases depend upon the circumstances.

In these observations I entirely concur.

[83] In *Rolland v. Hart* (1871) LR 6 Ch App 678, which was cited by *Doshi v. Yeoh Tiong Lay*, a solicitor induced a client to advance money for a borrower on mortgage of lands in Middlesex, and soon afterwards induced a second client to advance money on mortgage of the same lands without informing him of the existence of the first mortgage. The solicitor afterwards left the country, and the holder of the second mortgage registered it before the first mortgage was registered. In holding that the holder the second mortgage must be taken to have had, through the solicitor, notice of the first mortgage, and could not by the prior registration obtain priority, Lord Hatherley LC explained:

Then the only question is, what is actual notice? It has been held over and over again that notice to a solicitor of a transaction, and about a matter as to which it is part of his duty to inform himself, is actual notice to the client. Mankind would not be safe if it were held that, under such circumstances, a man has not notice of that which his agent has actual notice of. The purchaser of an estate has, in ordinary cases, no personal knowledge of the title, but employs a solicitor, and can never be allowed to say that he knew nothing of some prior incumbrance because he was not told of it by his solicitor.

It cannot be left to the possibility or the impossibility of the man who seeks to affect you with notice being able to prove that your solicitor did his duty in communicating to you that which, according to the terms of your employment of him, was the very thing which you employed him to ascertain.

I think it is clear, upon the authorities, that as there was, in this case, plain and distinct notice on the part of the solicitor employed by Mr. Stagg of the previous security, that notice must, therefore, imputed to Mr. Stagg.

[84] In *Sargent v. ASL Development Ltd* [1974] 131 CLR 634, it was noted at p. 649 that where a client authorised his solicitor to carry out a conveyancing transaction on his behalf, he 'thereby not only authorises his solicitor to perform all necessary steps but also places the solicitor in the position of acquiring at first-hand knowledge of relevant facts, at the same time depriving himself of the opportunity of acquiring such first-hand knowledge'.

[85] The authorities show clearly that there could be situations where an agent's own knowledge, which is acquired by the agent in a previous transaction or before his employment as agent may be imputed to the principal. That being the principle to be applied, we now turn to the present case.

[86] For what purpose was the solicitor appointed as agent of the defendant? It was his duty to prepare loan documentation and inquire about the title. The defendant for the purpose of facilitating the said conveyancing transaction appointed the solicitor. He prepared and settled documents. He was duty-bound to report back to the defendant on any encumbrances that he was aware of in respect of the transaction. It is particularly important to stress that the solicitor had a duty to investigate and communicate the results to the defendant (see *Chin Hein Chong v. Tey Sin Sze & Anor* [2017] 4 CLJ 348 and *Law Society of Singapore v. Udeh Kumar Sethuraju* [2013] 3 SLR 875). It is to be observed that the solicitor exercised a certain degree of authority over the transactions. The defendant relied on the opinion and skill of the solicitor. It was the solicitor's duty as agent of the defendant to obtain indefeasibility of interest for the charged land. The solicitor's knowledge of facts was acquired in a transaction on the same piece of land. The two connected transactions were separated from each other by a period of about three months. By a letter dated 25 July 2006, Messrs Ramesh Vasan & Co acting for the deceased wrote to the solicitor indicating that there was a dispute as to the ownership of the land. What is more glaring is that at the material time, the solicitor was actively involved in the dispute between the deceased and Nagarajan. By a letter dated 18 October 2006, the defendant granted the loan to Nagarajan. The solicitor must have been engaged by the defendant to prepare the security documents for the loan earlier than 18 October 2006. The more closely we look at the facts, the more apparent it became that the two transactions were immediately consequent on one another, and were very closely connected that the first must obviously have been still present in the solicitor's mind. The conclusion was inescapable. The solicitor could not claim to have forgotten the information in question. In the context of the present case, how the solicitor acquired the knowledge was irrelevant because it was material to the solicitor's duty to the defendant. In our opinion, under these circumstances, the knowledge of facts of the solicitor acquired in the earlier transaction must be imputed to the defendant in the course of acting for the defendant in the conveyancing transaction,

although the defendant was not interested in the earlier transaction. It matters not the solicitor was unwilling to reveal his knowledge of the facts to the defendant. As Megarry J said in in *Spector v. Ageda* [1973] Ch 30: A solicitor must put at his client's disposal not only his skill but also his knowledge, so far as is relevant; and if he is unwilling to reveal his knowledge to his client, he should not act for him.

[87] It is only through the auspices of the solicitor that the defendant could have acquired interest on the land that was now contested by the plaintiff; it would be wrong to allow the defendant to adopt the solicitor's actions whilst disowning the solicitor's knowledge of the dispute as to the ownership of the land and the allegation that Nagarajan obtained title to the land by fraud (see *Bowstead & Reynolds On Agency* at p. 546). In the imputation context, a third party could not know whether key information which it was the solicitor's duty to communicate had in fact been passed by the solicitor to the defendant. For reasons of third party protection, such key information was deemed to have passed from the solicitor to the defendant (see *Agency Law in Commercial Practice* at p. 207).

[88] Thus in the present case, the knowledge of the solicitor is regarded and treated by the law as the knowledge of the defendant. The defendant was therefore infected with the knowledge that there was a serious dispute as to the ownership of the land. What is more, the defendant knew of the allegation that Nagarajan obtained title to the land by fraud. This type of knowledge would affect the good faith of the defendant. In our opinion, the status of holder of interest in good faith is lost by reason of the material knowledge.

[89] In light of the fraud allegation, there was a real necessity to conduct further investigative work. The serious allegation was material enough to arouse suspicion and had a real capacity to affect the defendant's interest. In *El Ajou v Dollar Land Holdings Ltd Hoffmann* LJ explained the duty to investigate:

> ... there are cases in which the principal has a duty to investigate or to make disclosure. The duty to investigate may arise in many circumstances, ranging from an owner's duty to inquire about the vicious tendencies of his dog (*Baldwin v. Casella* (1872) LR 7 Exch 325 at 326-327) to the duty of a purchaser of land to investigate the title. Or there may be something about a transaction by which the principal is 'put on inquiry'. If the principal employs an agent to discharge such a duty, the knowledge of the agent will he imputed to him. (There is an exception, the scope of which it is unnecessary to discuss, in cases in which the agent commits a fraud against the principal.)

[90] In the face of the suspicious and uncertain circumstances under which the transaction was transacted, still the defendant proceeded to disburse the loan to Nagarajan and created the charge on the land without making further inquiries. Courts would be slow to assist chargee who failed to take ordinary

A precautions that ought to be undertaken before registering the charged land and as such are not entitled to the protection of the court. As observed by Fry J in *Kettlewell v. Watson*, "The court will not allow a man to avail himself of a legal estate which he has recovered, or of the right which he may have under a registered conveyance, knew a fact which made it unconscionable for
B him to take the legal estate or to effect the registration". On the facts of the present case, in our judgment, the element of 'carelessness and negligence' also negated good faith on the part of the defendant.

[91] By reasons thereof, the good faith of the defendant in the entire transaction was very lacking thereby defeating its statutory defence of being
C a purchaser in good faith under the proviso to s. 340(3) of the NLC. As such, in the circumstances, the defendant could not be said to have acquired the interest on the land in good faith. The charge created in favour of the defendant was therefore defeasible.

Answers To Leave Questions

D

[92] In consequence and in view of the above, our answers to the legal issues posed are as follows. In the context of the issues arising in the present appeal as well as the facts of the case, the answer to question 1 is in the affirmative.

E **[93]** Flowing from the above, our answer to question 2 is as follows. The general rule is that the knowledge of a solicitor is regarded by law as the knowledge of the client. An exception to the rule is only admitted where the solicitor is complicit in fraud.

Conclusion

F

[94] In all the above circumstances, we would therefore allow the appeal by the plaintiff with costs. In the result, the orders of the Court of Appeal are set aside and we hereby reinstate the order of the High Court though on different grounds.

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